

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOEL ROUSE

Claimant

VS.

MORTON BUILDINGS, INC.

Respondent

AND

AMERICAN ZURICH INSURANCE CO.

Insurance Carrier

Docket No. **1,044,054**

ORDER

Claimant requests review of the May 18, 2010 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

This is a claim for a January 5, 2009 accident. On that day the claimant fell at work after catching his heel on the top step of a truck that he was exiting. The Administrative Law Judge (ALJ) denied claimant's request for additional medical treatment because Dr. Paul Stein, whom the ALJ requested to perform an independent medical examination, did not believe claimant's cervical spine problems were related to the accident.

Claimant requests the Board to reverse the May 18, 2010 Order. He maintains the mechanics of the fall are both consistent with a cervical injury and the symptoms that he has experienced since the accident.

Respondent argues the Board does not have jurisdiction to review the preliminary hearing Order as the issue whether claimant injured his neck or cervical spine in the accident is a question of nature and extent rather than one of the jurisdictional issues listed in K.S.A. 44-534a. In the alternative, respondent argues the Board should adopt the opinions of Dr. Stein and affirm the Order.

The issues before the Board on this appeal are (1) whether the Board has jurisdiction to review the preliminary hearing Order, and, (2) whether claimant has

established the symptoms that some doctors have attributed to his cervical spine were either caused or otherwise related to his January 5, 2009 accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds and concludes:

Respondent maintains the Board does not have the jurisdiction to review the preliminary hearing Order as the issue presented to the ALJ was, in essence, the nature and extent of claimant's injury. The undersigned Board Member concludes the Board does have jurisdiction to review the preliminary hearing issue of whether an injured worker's symptoms stem from a work-related accident as that issue is, in essence, tantamount to whether a worker has sustained an injury that arises out of and in the course of employment.

Respondent employed the claimant, Joel Rouse, as a truck driver. While working at respondent's warehouse on January 5, 2009, claimant was exiting a truck when he caught his heel on the top step and fell three or four feet striking a concrete wall. There is no dispute that claimant sustained personal injury by accident arising out of and in the course of his employment with respondent.

After seeing several doctors claimant began treating with Dr. John Osland, who in May 2009 operated on claimant's right shoulder and repaired a rotator cuff tear, repaired a superior labral abnormality, and performed a subacromial decompression. On the same date, hand surgeon Dr. George Lucas decompressed the median nerve at the right wrist.

Despite surgery and extensive therapy, claimant has continued to experience pain. At his May 13, 2010 preliminary hearing, claimant testified he continues to experience swelling his right hand and right shoulder, and burning and tingling in that extremity. The claimant testified, in part:

Q. (Mr. Riedmiller) Tell the Court here today what problems you feel that you are having that you relate to this accident.

A. (Claimant) I am having a lot of tingling, a lot of numbness. I am actually having an episode now if I turn my neck a certain way, my whole right side just goes numb. I have blacked out from it. They, I mean, they, I mean, I am having a lot of pain and a lot of discomfort.¹

¹ P.H. Trans. at 13.

Claimant's surgeons, Drs. Osland and Lucas, concluded claimant's problems were related to a disk in the cervical spine.² Moreover, Dr. Osland believes that claimant's ongoing complaints are related to the January 2009 accident and that claimant should be evaluated by someone who does cervical spine surgery. Dr. Osland wrote, in part:

After that his shoulder pain has improved some with extensive therapy and the surgery but he still has pain. I felt that some of it was coming from his neck and so did Dr. Lucas. We ended up getting an MRI study and it showed some changes. He saw Dr. Goel who did interventions with his cervical spine doing and doing different injections. None of those had really helped him out. I feel there is nothing more than can be done with his shoulder. Dr. Lucas does not feel there is anything more to do with his peripheral nerves. At this point, we feel that his problem is related to a disk in his cervical spine.

At this point, my further recommendation is that he be evaluated by someone who does cervical spine surgery. I do not feel there is anything more that I can do. One of the questions asked was what if anything did the above described accident cause in the form of injuries and aggravations of injuries to this patient to his neck. He states he did not have this problem with the numbness, tingling, and pain before this and now he does. I think when he hit his right shoulder and arm, he probably twisted his neck somehow and that probably caused an injury. Certainly with him being grossly overweight, that does not help his condition at all and makes him more susceptible to problems. The last question is my opinion with a reasonable degree of medical certainty if this patient's neck complaints are work related. I think some of them are certainly related to his obesity but since he did not have problems with this before, I do feel this is work related.³

There is no dispute that claimant injured his right upper extremity when he struck his wrist and shoulder on the wall. The issue in this appeal is whether claimant also injured his neck or cervical spine. Claimant testified he also struck the side of his head when he fell at work, although that specific detail is omitted from a February 16, 2009 initial evaluation report by Dr. Christopher Siwek and a March 9, 2009 report authored by Dr. George Fluter, who examined claimant at the request of claimant's attorney. Claimant, however, advised Dr. Paul Stein, in January 2010, that he struck the right side of his neck and head in that accident. Moreover, Dr. Stein wrote in his January 4, 2010, medical report that claimant reported a history of neck pain after the injury but it did not become severe until later. In a January 4, 2010 report to the ALJ, Dr. Stein concluded in pertinent part:

Mr. Rouse states today that he had neck pain from early after the injury but it didn't get severe until later. I'm not certain of any mechanism specifically related to the work incident in which the neck pain should take several months to become severe.

² *Ibid.*, Cl. Ex. 6 at 1.

³ *Ibid.* at 1-2.

Based upon all of this information, it is my opinion that there is no documentation of a significant cervical spine injury occurring on 1/5/09.

In summary, Mr. Rouse's right shoulder and upper extremity symptoms are not related to cervical radiculopathy but are from a direct shoulder injury and likely a right ulnar entrapment at the elbow. His neck symptomatology is likely related to the cervical spine degenerative disease but there is no documentation to determine, within a reasonable degree of medical probability, that the symptomatology is related to the work incident.⁴

To counter Dr. Stein's conclusions, claimant introduced the October 26, 2009 medical report of Dr. Fluter. Dr. Fluter examined claimant a second time in late October 2009 and noted that claimant's symptoms had worsened in physical therapy following his right wrist and right shoulder surgeries. The doctor noted:

[C]laimant had some neck pain following the injury associated with some burning into the shoulder and arm. While the right shoulder surgery was beneficial, he continued to have burning pain in the neck radiating to the right shoulder and arm that did not resolve following surgery. The treating orthopedic surgeon ordered an MRI scan of the cervical spine that was done in August, 2009, and this showed evidence of a disc bulge at the C5-6 level.⁵

In addition, Dr. Fluter indicated that claimant had not had additional imaging studies since his symptoms had increased and that claimant was experiencing headaches and neck pain radiating into the right upper extremity. Finally, Dr. Fluter concluded that claimant's description of the accident suggested a traction injury involving the right shoulder girdle that could have also involved the neck structures and the fact that claimant's right upper extremity pain did not resolve with surgery indicated there was a component of referred pain from the cervical spine. And he noted, [t]here is evidence of cervical discopathy which more likely than not contributes to the shoulder and upper extremity symptoms.⁶

Claimant testified that early in his treatment he advised Drs. Siwek and Osland about having tingling and burning into his upper neck and tingling that went down into his hand. Moreover, claimant indicated he did not have any symptoms in his neck or right upper extremity when he sustained his accident. And that testimony is uncontradicted.

Considering the entire record, the undersigned Board Member finds that claimant either injured or aggravated his cervical spine in the January 2009 accident and, therefore, the preliminary hearing Order should be reversed. Dr. Stein's opinion to the contrary

⁴ *Ibid.*, Resp. Ex. 1.

⁵ *Ibid.*, Cl. Ex. 7 at 2.

⁶ *Ibid.* at 4.

appears to be based upon a lack of medical records that document claimant's neck complaints. But patients do not control the entries into medical records. Moreover, the treatment initially provided claimant focused upon his right wrist and right shoulder complaints. Also, the medical records indicate that claimant's symptoms significantly increased during his post-surgery physical therapy and that his surgeons did not fully appreciate the extent or potential cause of claimant's symptoms until his right shoulder symptoms failed to resolve.

The claimant has established the ongoing symptoms around his neck and right upper extremity, which some doctors have attributed to his cervical spine, are related to his January 2009 accident. Accordingly, the preliminary hearing Order denying claimant medical benefits for those symptoms should be reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge John D. Clark dated May 18, 2010, is reversed and remanded to further consider claimant's requests for medical benefits and temporary total disability benefits.

IT IS SO ORDERED.

Dated this 30th day of July, 2010.

DAVID A. SHUFELT
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

⁷ K.S.A. 44-534a.

⁸ K.S.A. 2009 Supp. 44-555c(k).